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No. 450

In the Supreme Court of the United States

OCTOBER TERM, 1961

EASTERN AIR LINES, INC., PETITIONER

v.

CIVIL AERONAUTICS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE CIVIL AERONAUTICS BOARD IN OPPOSITION

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OPINIONS BELOW

The opinion of the Court of Appeals for the District of Columbia Circuit (Pet. 35–40) is not yet reported. The opinion and order of the Civil Aeronautics Board (S.J.A. 1–104)[1] are not yet reported.

JURISDICTION

The judgment of the Court of Appeals was entered on June 29, 1961. The petition for a writ of certiorari was filed on September 27, 1961. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

[1] "S.J.A." refers to the Supplemental Joint Appendix in the court below.

QUESTIONS PRESENTED

In 1956 the Civil Aeronautics Board instituted on its own motion a general investigation into the passenger fare level of the domestic trunkline air carriers. Among its purposes were the determination of whether the existing level was unjust or unreasonable, and, if so, what percentage changes in the fares of the carriers should be permitted or required. During the five years following the investigation order the upward trend in airline profits was reversed and various interim percentage increases were allowed. The Board then concluded that it could not fix a general fare level for the future (1) because the record before it contained no "reliable indicia of * * * future * * * operations, revenues, and expenses," and (2) because far-reaching technological changes pending in the industry precluded the use of a record reflecting present conditions as a basis for setting future fares (S.J.A. 6–8). Instead, the Board issued an opinion and order which established standards in the basic areas of rate of return, rate base, depreciation and taxes for use in future fare regulation, and terminated the proceeding. The question presented is whether the court of appeals properly held that, in the circumstances of this case, the Board did not abuse its discretion in terminating the investigation without fixing a general fare level for the future.

STATUTES INVOLVED

The provisions of the Federal Aviation Act principally involved are set forth in the Appendix, *infra*, pp. 11–12.[2]

STATEMENT

The Federal Aviation Act embodies the usual regulatory rate making pattern which permits carriers initially to fix, and thereafter to alter, their own domestic rates by filing tariffs with the Civil Aeronautics Board (Sec. 403). The Board may suspend a proposed rate pending an investigation and determination of its reasonableness (Section 1002(g)) and it may institute proceedings on its own initiative for the determination of the reasonableness of an existing rate (Section 1002 (b) and (d)).

The present proceeding, initiated on May 10, 1956, on the Board's own motion, was a general investigation into the passenger fare level of the domestic trunkline carriers. Its objectives were to find if the level was unjust or unreasonable and, if so, to determine the over-all percentage changes in the fares which should be permitted or required in the case of particular carriers or groups of carriers, as well

[2] The Federal Aviation Act (72 Stat. 731, 49 U.S.C. 1301) became effective on December 31, 1958 and superseded the Civil Aeronautics Act of 1938 (52 Stat. 973, 49 U.S.C. (1952 ed.) 401). There were no significant changes in the provisions pertinent to this proceeding.

as to "afford all interested parties the opportunity to air all relevant problems" (J.A. 316a–317a, 326a–327a, 332a).[3] Questions as to fare structure were excluded from the scope of the investigation (J.A. 316a, 328a–330a). The twelve domestic trunkline carriers, including petitioner, were made respondents (J.A. 317a–318a), and other interested parties were permitted to intervene (J.A. 333a).

In 1957 industry conditions worsened and carrier profits began to drop. During the hearings before the examiner, petitioner urged an overall increase of 15% above the 1957 fare level, and beginning in February 1958 increases totalling approximately 10% were allowed by the Board. After lengthy evidentiary hearings, the examiner issued an initial decision in May 1959, in which he concluded that the industry should be permitted an over-all 10.6% rate of return on a prudent investment base and recommended a 12% increase above the pre-February 1958 fare level to achieve that result (S.J.A. 7).

The position of the carrier respondents (including petitioner) at the time of oral argument before the Board was that the Board should not enter an order fixing a precise fare level. Rather, they contended that the Board should enter an order which permitted but did not require an increase in fare levels by "whatever percentage" over the pre-existing level was found proper (J.A. 344a). Stated differently, the industry requested the Board to advise it that the Board would not suspend and investigate rates

[3] "J.A." refers to the Joint Appendix in the court below.

which would produce a stated percentage increase in carrier revenues (J.A. 344a–346a).

After the oral argument the Board announced by press release that it had decided that the appropriate industry rate of return was 10.5% (Pet. 12). New tariffs including rate increases were filed, which the Board suspended (Pet. 18). It announced, however, that it would accept tariffs representing an additional 5% overall increase (Pet. 18–19), an amount which brought the total increase from 1957 levels to more than 15% and which, in the Board's view, would give the industry the 10.5% return which it had announced it had determined upon as proper. Substitute tariffs within the Board's standards were filed, accepted on an interim basis and later allowed to become permanent (Pet. 7).

On November 25, 1960 the Board entered its formal opinion and order. The opinion reviewed the examiner's conclusions respecting rate of return, rate base, depreciation, and taxes, and adopted them with some modifications as standards for use in future rate regulation. The Board further found, however, that it was unable to fix reasonable and just future fare levels because no party had submitted forecasts of operations, revenues, and expense which "we find are reliable indicia of what future results will be" (S.J.A. 8). It pointed out that the estimates made at the time of the hearings were markedly different from the subsequent operation results (S.J.A. 55–58) and that there were no data relating to the new jet aircraft which by the end of 1961 would constitute

40% of the domestic trunkline fleet. Hence, said the Board, "we are without a trustworthy basis for projecting future results" and determining the "appropriate fare levels for representative, relatively extended periods * * *" (S.J.A. 58–59). The Board further found that, in view of the unsettled state of the industry due to the transition to jet aircraft, no useful purpose would be served by reopening the record and that "further hearing at this point would in all likelihood produce fruitless results and yet impose heavy burdens on all concerned" (S.J.A. 59). Accordingly, the Board terminated its investigation, stating that it would utilize the standards developed both in assessing future fare proposals of the carriers and as an aid in evaluating fares on its own motion on the basis of operating results (S.J.A. 9).

Petitioner subsequently addressed a letter to the Board to the effect that petitioner maintained its previous positions on a number of the matters which the Board had determined. It did not, however, seek reconsideration thereon or with respect to the failure of the Commission to issue a mandatory or permissive rate order (J.A. 347a). Petitioner then sought review in the court of appeals of the Commission's failure to issue a rate order. Several of the carrier parties to the Board proceeding intervened in support of the Board's order.[4] The court of appeals affirmed unanimously (Pet. 35–40). The court recognized that the proceedings had resulted in important findings which would be useful to the

[4] No party to the Board's proceeding sought intervention in support of petitioner's position.

Board in future rate proceedings. It held that the agency had not "reached a point where it could not lawfully exercise a discretion to terminate the proceedings" (Pet. 39), and that

> The duty of the Board to prevent unjust and unreasonable rates, and to establish those that are lawful, does not require that the duty be performed as a result of this particular investigation. We cannot say that the Board's decision not to decide the question of justness or reasonableness of the general level of trunkline fares requires this court to compel the Board to do so on this record or as it might be enlarged at this time, especially in view of the changes now under way in the industry. The Board's duty is to be performed in the context of particular proceedings. It is not mandatory in this one [Pet. 40].

ARGUMENT

Petitioner has shown neither a conflict in decision nor a substantial issue of law otherwise warranting review by this Court. As the court of appeals correctly held, there is no legal principle which requires an agency, irrespective of the circumstances, to determine with finality every issue which has been the subject of a hearing and on which evidence has been received. On the contrary, the considerations which grant the agency discretion to initiate a general rate proceeding similarly permit termination of a proceeding when the circumstances warrant. The stage to which the proceeding has progressed is at best merely a factor to be considered in determining whether discretion has been abused. There is no fixed point at

which an agency is *ipso facto* precluded from terminating such a proceeding, and the question is determined by the nature of the case as well as all the other relevant circumstances.

Here the Board's proceeding was a broad and comprehensive investigation into the rate problems of an entire industry rather than a narrow inquiry into a particular rate.[5] The Board decided all the issues as to which it believed the record permitted meaningful conclusions. Definite standards to be applied in future rate making were adopted, and the duration and complexity of subsequent proceedings were thereby appreciably lessened. Having achieved all that the record in the light of recent developments permitted, the Board properly terminated its investigation. Nor is the legitimacy of the Board's action affected by its original intention of making an evaluation of the continuing acceptability of then-current fare levels. For as the court of appeals correctly observed, "[t]he duty of the Board to prevent unjust and unreasonable rates, and to establish those that are lawful, does not require that the duty be performed as a result of this particular investigation * * *. The Board's duty is to be performed

[5] In its order delineating the scope of the investigation, the Board stated its intention to first examine the general revenue situation [and] order appropriate percentage adjustments in fares, if necessary" (J.A. 329a); it "retain[ed] flexibility to alter [its] course should circumstances so dictate" (*ibid.*) and described the proceeding as "a comprehensive investigation which will afford all interested parties the opportunity to air all relevant problems" (J.A. 332a).

in the context of particular proceedings. It is not mandatory in this one" (Pet. 40).

The cases relied on by petitioner are not to the contrary. In *Minneapolis Gas Co.* v. *Federal Power Commission,* decided March 9, 1961 (C.A.D.C.), the agency had permitted a particular new rate to become effective by dismissing a contested proceeding after a tariff embodying the rate had been suspended pending investigation and the hearing examiner had found the rate unlawful. As the court below observed (Pet. 38–39), unlike the present case, where the Board decided all the issues to the extent permitted by the record, the Power Commission's failure to decide the validity of the challenged tariff was inconsistent with its obligation either to let the initial decision of the examiner stand or to render its own decision as to the validity of the tariff in the light of the evidence presented in the record in that case.

The other cases cited by the petitioner are even less in point. In *Greensboro-High Point Airport Authority* v. *Civil Aeronautics Board,* 231 F. 2d 517 (C.A.D.C.), the court held that the Board could not finally approve a route application without passing upon a contention of the petitioner. And *Louisville & N.R. Co.* v. *Behlmer,* 175 U.S. 648, and *East Tenn., Va. & Ga. Ry.* v. *Interstate Commerce Commission,* 181 U.S. 1, are merely cases where the Commission had rejected contested rates on one of the several challenges presented, and this Court, in setting aside that determination as legally erroneous,

remanded the cases to the Commission to consider the remaining allegations of error.

CONCLUSION

No question is presented which warrants further review by this Court. The petition for a writ of certiorari should be denied.

Respectfully submitted.

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NOVEMBER 1961.

APPENDIX

The Federal Aviation Act of 1958, 72 Stat. 731, 49 U.S.C. 1301 *et seq.* provides in pertinent part:

> SEC. 404(a). [72 Stat. 760, 49 U.S.C. 1374(a)] It shall be the duty of every air carrier to provide and furnish interstate and overseas air transportation, as authorized by its certificate, upon reasonable request therefor and to provide reasonable through service in such air transportation in connection with other air carriers; to provide safe and adequate service, equipment, and facilities in connection with such transportation; to establish, observe, and enforce just and reasonable individual and joint rates, fares, and charges, and just and reasonable classifications, rules, regulations, and practices relating to such air transportation; and, in case of such joint rates, fares, and charges, to establish just, reasonable, and equitable divisions thereof as between air carriers participating therein which shall not unduly prefer or prejudice any of such participating air carriers.
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> * * * * *
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> SEC. 1002(b). [72 Stat. 788, 49 U.S.C. 1482 (b)] The Administrator or Board, with respect to matters within their respective jurisdictions, is empowered at any time to institute an investigation, on their own initiative, in any case and as to any matter or thing within their respective jurisdictions, concerning which complaint is authorized to be made to or before the Administrator or Board by any provision of this Act, or concerning which any question may arise under any of the provisions of this Act, or relating to the enforcement of any of

the provisions of this Act. The Administrator or the Board shall have the same power to proceed with any investigation instituted on their own motion as though it had been appealed to by complaint.

* * * * *

SEC. 1002(d). [72 Stat. 788, 49 U.S.C. 1482(d)] Whenever, after notice and hearing, upon complaint, or upon its own initiative, the Board shall be of the opinion that any individual or joint rate, fare, or charge demanded, charged, collected or received by any air carrier for interstate or overseas air transportation, or any classification, rule, regulation, or practice affecting such rate, fare, or charge, or the value of the service thereunder, is or will be unjust or unreasonable, or unjustly discriminatory, or unduly preferential, or unduly prejudicial, the Board shall determine and prescribe the lawful rate, fare, of charge (or the maximum or minimum, or the maximum and minimum thereof) thereafter to be demanded, charged, collected, or received, or the lawful classification, rule, regulation, or practice thereafter to be made effective: *Provided,* That as to rates, fares, and charges for overseas air transportation, the Board shall determine and prescribe only a just and reasonable maximum or minimum, or maximum and minimum rate, fare, or charge.